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Supreme Court, U.S.
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001376 MAR - 1 2001

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No. _____

In The

Supreme Court of the United States

CARL GENE COLLINS, ROBERT W. PEUFFIER,

Petitioners,

v.

MAC-MILLAN BLOEDEL, INC., JOHN CRANE CO., INC., and OWENS-ILLINOIS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

Does 28 U.S.C. § 1407(a) permit the Judicial Panel on Multidistrict Litigation to remand a civil action to the transferor court, but hold the punitive damages issues with the transferee court?

PARTIES TO THE PROCEEDING

Petitioners

Carl Gene Collins, Robert W. Peuffier

Respondents

Mac-Millan Bloedel, Inc., John Crane Co., Inc., and Owens-Illinois, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

A. Mandamus Is the Appropriate Remedy to Correct the Judicial Panel on Multidistrict Litigation's Failure to Exercise Its Duty to Remand 3

B. 28 U.S.C. § 1407(a) Does Not Permit the Judicial Panel to Remand a Civil Action to the Transferor Court, But Retain the Issues Pertaining To the Prayers for Punitive Damages 4

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bennett v. McKibben, 915 P.2d 400 (Okla. App. 1996) 8

Bird v. Rozier, 948 P.2d 888 (Wyo. 1997) 8

Brooks v. Bank of Boulder, 891 F. Supp. 1469 (D. Colo. 1995) 8

Brown v. Maxey, 124 Wis.2d 426, 369 N.W.2d 677 (1985) 8

DeBry v. Cascade Enterprises, 879 P.2d 1353 (Utah 1994) 8

K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 108 S. Ct. 1811, 100 L.Ed.2d 313 (1988) 4

Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978) 9

Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 555 A.2d 800 (1989) 8

Kleinwort Benson North America, Inc. v. Quantum Fin. Services, Inc., 181 Ill. 2d 214, 692 N.E.2d 269 (1998) 8

Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 118 S. Ct. 956 (1998) 4

Lund v. J.C. Penney Outlet, 911 F. Supp. 442 (D. Nev. 1996) 7

Martin v. Cambas, 134 Or. 257, 293 P. 601 (1930) 9

Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991) 7

TABLE OF AUTHORITIES – Continued

Page

McLaughlin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 23 Cal.App.4th 1132, 29 Cal.Rptr.2d 559 (1994) 8

Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979) 9

Rocanova v. Equitable Life Assurance Soc. of the U.S., 83 N.Y.2d 603, 634 N.E.2d 940 (1994) 8

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)..... 1

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1407(a) ..... *passim*

FED. R. CIV. PROC. 13..... 5

FED. R. CIV. PROC. 14..... 5

FED. R. CIV. PROC. 2..... 5

FED. R. CIV. PROC. 42..... 6, 10, 11

OTHER

Multiparty, Multiforum Jurisdiction Act of 1990, H.R. Rep. 101-515, H.R. Rep. No. 515, 101st Cong., 2nd Sess. (June 1, 1990) 7

Multiparty, Multiforum Jurisdiction Act of 1991, H.R. Rep. 102-373, H.R. Rep. No. 373, 102nd Cong., 1st Sess. (Nov. 25, 1991)..... 7

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published at 233 F.3d 809, and is attached as Appendix A.

JURISDICTION

The court of appeals' order was entered on December 1, 2000. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1). *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (certiorari jurisdiction over a mandamus order of a court of appeals.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Appended as Appendix B is 28 U.S.C. § 1407.

STATEMENT OF THE CASE

Eight years ago, the Judicial Panel on Multidistrict Litigation transferred all pending federal asbestos personal injury damages cases to Judge Charles Weiner in the Eastern District of Pennsylvania. But the MDL story the Panel set out to write in 1991 – with its utopian vision of global resolution of asbestos cases – has not and will not come to pass. Instead, MDL 875 has created interminable delays for thousands of plaintiffs whose cases have been transferred. A consolidation that began as an effort to streamline the resolution of asbestos cases has instead

prevented the vast majority of those cases from reaching trial, even when discovery has been completed and settlement efforts have been exhausted. Now, a transferee court charged with the limited, procedural authority to coordinate common discovery has instead chosen to undertake the substantive task of preserving the assets available to satisfy asbestos claims by refusing to remand punitive damage issues even after remanding the rest of the case. The question is whether Congress intended for the Judicial Panel on Multidistrict Litigation to have this extraordinary substantive power by enacting the procedures which allow Multidistrict litigation, powers usually wielded by Congress, State Legislatures, State Courts and federal Bankruptcy Courts.

The Third Circuit affirmed the superlegislative decision of the Judicial Panel, holding that Section 1407 permits unlimited fragmentation of punitive damages from asbestos cases.

The Petitioners are two people who have already died of malignant mesothelioma, Messrs. Peuffier and Collins. In the district court assigned all federal asbestos cases, they moved to remand their claims for trial. The MDL court, in line with its stated policy of giving priority to cancer victims, suggested that the Petitioners' claims be remanded, except for the prayers for punitive damages. The Judicial Panel did as the transferee court suggested, and entered orders remanding the actions, sans punitive damages. The Petitioners specifically moved the Panel to remand the punitive damages issues, whereafter the Judicial Panel heard argument and then entered orders refusing to remand the punitive damage issues. A Petition for Writ of Mandamus was then filed with the

Third Circuit Court of Appeals, which denied the Petitioners' Writ with opinion.

REASONS FOR GRANTING THE WRIT

A. Mandamus Is the Appropriate Remedy to Correct the Judicial Panel on Multidistrict Litigation's Failure to Exercise Its Duty to Remand

The Third Circuit's opinion treats this mandamus proceeding just as any other, with all of the traditional deference normally affording such extraordinary writs. Petitioners believe that at the outset, the Third Circuit erred by applying the transitional mandamus rubric without taking into account the fact that the Congress has already made the determination that mistakes of the Judicial Panel should be corrected via the procedural mechanism of the writ of mandamus. Since such writs are available at common law, Congress's specific instruction that the Panel be reviewed through mandamus would be superfluous unless the intention was to relax the standards applicable to this statutory mandamus remedy, so that if legal error was made, it can be corrected. Under the Third Circuit's approach, legal error can (and did) go unremedied because of additional barriers to review presented through application of common law mandamus standards of review.

Here, under any set of standards, Petitioners had before the circuit court a "clear and indisputable" right to mandamus because the Judicial Panel failed to exercise its statutory duty to remand Petitioners' prayers for punitive damages to the transferor district courts pursuant to 28

U.S.C. § 1407(a), since the rest of their civil actions had been remanded. The Panel's duty to follow the clear dictates of Section 1407 are "impervious to judicial discretion," *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 118 S. Ct. 956, 962 (1998).

B. 28 U.S.C. § 1407(a) Does Not Permit the Judicial Panel to Remand a Civil Action to the Transferor Court, But Retain the Issues Pertaining to the Prayers for Punitive Damages

The relevant statutory authorization reads as follows:

> Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district court from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any *claim, cross-claim, counter-claim, or third-party claim* and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(a) (underlining added). As this Court made clear in the *Lexecon* case, the powers of the Panel are limited by the plain meaning of the enabling statute, 28 U.S.C. § 1407. *Lexecon*, 118 S. Ct. at 962. Thus, the question presented here is one of statutory construction – the legal issue of whether in the MDL statute's Proviso, Congress intended a prayer for punitive damages to be considered either a "claim, cross-claim, counter-claim, or third-party claim."

Statutory language must, if possible, be given its plain, ordinary, meaning. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817, 100 L.Ed.2d

313 (1988). Here, Congress's language is indeed clear that prayers for punitive damages are not to be considered either a "claim, cross-claim, counter-claim, or third-party claim." In Section 1407, Congress refers to the entire case subject to MDL transfer as a "civil action" or "action." Congress states that the "action" may be remanded at or before the conclusion of coordinated pretrial proceedings. Congress then states the Proviso, allowing the Panel to separate a "claim, cross-claim, counter-claim, or third-party claim," and permitting the Panel to remand any of those *claims* before the "remainder of the *action*."

The structure of the statute could not be any clearer. The "action" is the primary "unit," consisting of the entire "civil action" as that familiar term is used in Rule 2, Federal Rules of Civil Procedure. Then, by including the partial remand Proviso, Congress allows only certain sub-units of an "action" to be separated and remanded, those sub-units being either a "claim, cross-claim, counter-claim, or third-party claim."

Obviously, a prayer for punitive damages is neither a "cross-claim" (Rule 13(g), FED. R. CIV. P.), nor a "counter-claim" (Rule 13(a-f), FED. R. CIV. P.), nor a "third-party claim" (Rule 14, FED. R. CIV. P.). Is a prayer for punitive damages a "claim" as that term was used by Congress? Obviously not. Since the "action," the entire unit, and partial remands are specifically authorized for all the varieties of ways that a *defendant* brings *its causes of action* against the plaintiff or others (*i.e.*, cross-claims, counter-claims and third-party claims), the only logical and plain meaning which can be attributed to the term "claim" is, of course, the *plaintiff's causes of action* against the defendant.

Other than the plain meaning of this statute, there is ample additional authority making it crystal clear that where Congress desires to give courts the authority to fragment actions into "issues" – that is, small legal units incapable of existing as free-standing causes of action – *it simply says so*. Especially significant here is contrasting the language of Section 1407(a), with Rule 42(b), Federal Rules of Civil Procedure. For the purpose of remand, Section 1407(a) permits the Panel to fragment civil actions into the following constituents: "claim, cross-claim, counter-claim, or third-party claim." However, Rule 42(b) allows a district court to "order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, *or of any separate issue*." Rule 42(b), FED. R. CIV. P. (emphasis added). Congress's contemporary usage is certainly strong evidence that Congress meant what it said in Section 1407, and did not intend for civil actions to be partially remanded unless what is left behind can exist as a free-standing cause of action, as is the case with claims, cross-claims, counterclaims and third-party claims.

In addition, in proposing amendments to Section 1407, Congress has specifically discussed punitive damages in terms of such prayers being "issues" in an action, not "claims." This, again, provides ample support for the proposition that Congress meant what is said in Section 1407, and that punitive damages prayers do not constitute "claims" as that term is used in Section 1407 – although given the statute's plain meaning, nothing more is required and the inquiry is finished. But, on two separate occasions, the House of Representatives has suggested certain reforms regarding the matter of punitive damages in Multidistrict Litigation. The House passed

the "Multiparty, Multiforum Jurisdiction Act of 1990," H.R. Rep. 101-515, H.R. Rep. No. 515, 101st Cong., 2nd Sess. (June 1, 1990) and the "Multiparty, Multiforum Jurisdiction Act of 1991," H.R. Rep. 102-373, H.R. Rep. No. 373, 102nd Cong., 1st Sess. (Nov. 25, 1991).

In these Acts, Congress stated as follows:

> For similar reasons, the bill permits joint trial of *punitive damage issues*. Whereas case-to-case variations in facts relevant to resolving compensatory damage issues will ordinarily be such that there is no net gain to having those issues tried by a single court, that is not the case with *punitive damage issues*; moreover, by consolidating punitive damage determinations, the risk of inappropriate, multiple punitive damage awards is reduced.

It is clear that Congress did not intend for the Panel to engage in partial remands unless what is remanded, and what remains, are both free-standing causes of action capable of adjudication as such.

The question that remains is only whether a prayer for punitive damages can be considered a cause of action brought by a plaintiff against another party. Cases considering this issue have uniformly *rejected* the position that a prayer for punitive damages is a "cause of action" – as opposed to being simply a form of relief available to a party based upon the nature of the underlying causes of action pleaded. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) ("A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff's case.") (Kansas law); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442, 445 (D. Nev. 1996)

("Defendant points out, correctly, that punitive damages are a remedy, not a cause of action.") (Nevada law); *Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1480 (D. Colo. 1995) ("A claim for exemplary damages is not an separate and distinct claim, but is auxiliary to an underlying claim for actual damages.") (Colorado law); *Kleinwort Benson North America, Inc. v. Quantum Fin. Services, Inc.*, 181 Ill. 2d 214, 224, 692 N.E.2d 269, 274 (1998) ("punitive damages are a type of relief, not an independent cause of action."); *Bird v. Rozier*, 948 P.2d 888, 892 (Wyo. 1997) ("if a plaintiff has failed to establish his basic cause of action, there is no separate cause of action for punitive damages alone."); *Bennett v. McKibben*, 915 P.2d 400, 405 (Okla. App. 1996) ("A plea for punitive damages is generally considered to be an element of recovery on an underlying cause of action: it is not a separate cause of action."); *DeBry v. Cascade Enterprises*, 879 P.2d 1353, 1359 (Utah 1994) ("There is no cause of action as such for punitive damages."); *Rocanova v. Equitable Life Assurance Soc. of the U.S.*, 83 N.Y.2d 603, 616, 634 N.E.2d 940, 945 (1994) ("A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud."); *McLaughlin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 23 Cal.App.4th 1132, 1164, 29 Cal.Rptr.2d 559, 579 (1994) ("In California, there is no separate cause of action for punitive damages."); *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 101, 555 A.2d 800, 802 (1989) ("If no cause of action exists, then no independent action exists for a claim of punitive damages since punitive damages is only an element of damages."); *Brown v. Maxey*, 124 Wis.2d 426, 431, 369 N.W.2d 677, 680 (1985) ("We stress that punitive damages are in the nature

of a remedy and should not be confused with the concept of a cause of action."); *Pringle Tax Service, Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979) ("Exemplary damages . . . are only incidental to the main cause of action."); *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978) ("An award of punitive damages is purely incidental to the cause of action."); *Martin v. Cambas*, 134 Or. 257, 261, 293 P. 601, 603 (1930) ("Exemplary damages can never constitute the basis of a cause of action.").

Reviewing the opinion of the Third Circuit, it becomes very clear that the Circuit Court decided this case from a perspective other than one of statutory construction. This proceeding concerns Congress's intended meaning of the phrase "claim, cross-claim, counter-claim or third-party claim" in the Multidistrict Litigation statute. This proceeding did not and does not concern the questions of (1) whether it is good public policy for the MDL statute to be used for purposes of asset preservation of asbestos defendants; (2) whether or not the Judge presiding over the MDL proceedings is doing a good job of settling asbestos cases; (3) whether or not there is "too much" asbestos litigation in federal (or state) courts; or (4) what plaintiffs are more or less deserving of compensation. These decisions are, under our Constitution, entrusted to others; the Congress, the Legislatures of the several states, the State Courts as they continue to develop their tort laws and federal Bankruptcy Courts which, at the specific behest of Congress, enforce and administer Title 11 of the United States Code.

The Third Circuit's opinion is flawed legally too, irrespective of the policy concerns which apparently drove the result. First, the court placed significance in the

fact that some courts try punitive damages separately under Rule 42(b). Yet, it is quite unremarkable that federal courts have separated punitive damage issues for trial, as Rule 42(b) clearly allows separate issues to be tried separately. In no way does this kind of separation indicate that punitive damages constitute "claims" under Section 1407, especially since that section has language that omits the ability to separate "issues," unlike Rule 42(b).

Similarly, there is no significance of the fact that in order to recover punitive damages, a plaintiff must bring forward proof of facts which are independent of the proof used to establish liability. This logic proves too much, as it is equally true that a plaintiff must bring forward proof of facts which are independent of the proof used to establish liability, to recover *actual* damages. A lawsuit seeking naked damages, *i.e.*, a suit for the damages attributed some legal wrong, obviously cannot be brought unless attached to some cause of action for which damages are recoverable. Punitive damages are just the same. As far as "independent" proof to show punitive damages is concerned, the same can be said of actual damages. Obviously, one needs to prove certain facts to show the amount and nature of damages and that proof is separate and apart from facts needed to establish liability or duty. Consequently, it is of no moment with regard to the meaning of the term "claim" that punitive damages must be proved using evidence that is unique to those kinds of damages.

Another line of reasoning is that punitive damages have been characterized by some writers as "dependent claims for relief." There is no force to this logic, and it

certainly does not convert what is one of many separate issues in a tort case into a claim for relief. Punitive damages are certainly "dependent" upon other aspects of a case, whether it is duty, causation or actual damages. Nevertheless, there is no "cause of action" for punitive damages which can be brought independently of the cause of action which includes actual damages. In other words, such an action is not "free-standing," and as such is not what the Congress recognized in Section 1407 as a "claim." Returning at this point to the primary issue of statutory interpretation – the contrast between Section 1407 and Rule 42(b) – it is clear that the operative distinguishing feature is that Rule 42(b) allows separation of litigation sub-units that cannot be litigated on a free-standing basis, while the less expansive language of Section 1407 does not permit remands where what is separated cannot be litigated on a free-standing basis. As a result, the characterization of punitive damages as "dependent" upon other facts or causes of action is a red herring which is of no moment to the question of whether punitive damages are "claims" under Section 1407.

Because the plain meaning of the term "claim" does not encompass a prayer for punitive damages, neither the transferee court nor the Panel had any authority to separate the punitive damage issues from the remainder of the action. Therefore, since the remainder of this action has been remanded, the punitive damage issues must be remanded as well, and the Third Circuit erred.

CONCLUSION

The Third Circuit Court of Appeals and the Judicial Panel on Multidistrict Litigation committed clear and indisputable error by acting outside the confines of Section 1407 by ordering a partial remand of the Petitioners' cases leaving behind the punitive damages issues. Only this Court can correct the clear, indisputable, and manifestly unfair error committed by refusing to remand their punitive damages prayers for relief. Petitioners respectfully ask this Court to grant this Petition for Certiorari and correct these errors.

Respectfully Submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

United States Court of Appeals, Third Circuit.

In re Mary Nell COLLINS, Individually and as Personal Representative of the Heirs and Estate of Carl Gene Collins, Deceased,
In re Barbara and Frederick Hoffman,
In re Marjorie Peuffier, Individually and as Personal Representative of
the Heirs and Estate of Robert Peuffier, Deceased, Petitioners.

No. 00-1009.

Submitted Pursuant To Third Circuit L.A.R. 34.1(a)
Oct. 6, 2000.
Filed Dec. 1, 2000.

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Before: BARRY, ROSENN, and WEIS, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

Petitioners seek a writ of mandamus directing the Judicial Panel on Multidistrict Litigation to remand punitive damages claims for trial together with the remainder of personal injury claims arising from asbestos exposure. We will deny the petition for mandamus.

Petitioners are four individuals seeking damages for injuries resulting from exposure to asbestos. Pursuant to 28 U.S.C. § 1407(a) the claims were transferred by the Judicial Panel on Multidistrict Litigation to Multidistrict Litigation No. 875, which is pending in the United States District Court for the Eastern District of Pennsylvania.

At the suggestion of the transferee judge, when the Judicial Panel remanded the petitioners' claims to the transferor courts, it withheld remand on the requests for punitive damages. This action was consistent with the transferee court's practice in multidistrict litigation asbestos cases over the past decade of retaining demands for punitive damages while allowing the compensatory matters to proceed to trial. The practice has been noted by this Court before. *See In re Patenaude*, 210 F.3d 135, 140 n. 3 (3d Cir.2000) ("The [transferee] court also has a practice when it does remand cases of severing and retaining jurisdiction over punitive damages claims."); *Dunn v. HOVIC*, 1 F.3d 1371, 1400 n. 13 (Weis, J., dissenting).

Petitioners contend that in "undertak[ing] the substantive task of preserving the assets available to satisfy

asbestos claims by refusing to remand the punitive damages issue," the Panel is overstepping its authority. They argue section 1407(a) only permits the Panel to separate "claims," but requests for punitive damages do not have the characteristics of independent claims because a party cannot bring an action for such awards in isolation. On that basis, petitioners assert that the law treats punitive damages as a form of relief, not a claim or cause of action.

Respondents point out that claims for punitive damages, although dependent on factors justifying compensatory awards, require separate elements of proof such as malice, fraud, or gross negligence. Moreover, respondents observe that many courts require or permit evidence of a defendant's wealth, a factor not generally permitted when only compensation is sought. Because such evidence is necessary in order for a jury to assess punitive damages, but irrelevant to the merits of other claims, many jurisdictions also require that the punitive damages counts be tried separately from proceedings that determine compensatory awards.

Section 1407(a) provides that "civil actions involving one or more common questions of fact . . . may be transferred [by the judicial panel on multidistrict litigation] to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). At or before conclusion of the pretrial procedures, the Panel is to remand those cases to the districts from which they were originally transferred, "*[p]rovided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." *Id.*

Essentially, the petitioners would have us construe "claim" in section 1407(a) to be synonymous with "cause of action," and a request for punitive damages to be merely an "issue" as that term is used in Federal Rule of Civil Procedure 42(b). We reject these contentions. As a term of art and in common parlance, the meaning of "claim" is not so circumscribed. For example, a cause of action based upon negligence frequently is described as including "claims" for property damage, lost wages, medical bills, and pain and suffering. Neither the statute's language nor the snippets of legislative history cited to us provides a basis for adopting the petitioners' crabbed reading of the word. Rather, the legislative history of section 1407 demonstrates "that Congress intended transferee courts to have broad pretrial authority." *Patenaude*, 210 F.3d at 144. In our view, the Panel's expansive interpretation of "claim" is the more reasonable one and that which we endorse.

Furthermore, although a demand for punitive damages does not stand alone, it is not simply a component of a claim inseparable from the whole. This distinctiveness is demonstrated by case law allowing new trials devoted solely to determining punitive damages. *See, e.g., Denesha v. Farmers Ins. Exch., Inc.*, 161 F.3d 491, 505 (8th Cir.1998); *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 517 (7th Cir.1997). Separate trials of punitive damages claims are also permitted. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474-75 (5th Cir.1986). A request for punitive damages is similar to a derivative claim, such as for loss of consortium, and may properly be characterized as "a separate but dependent claim for relief" that must be supported by

independent allegations and proof. 1 James D. Ghiardi, et al., *Punitive Damages L. & Prac.*, § 12.07 at 22-23, 25 (1999).

In addition, the statute grants unusually broad discretion to the Panel to carry out its assigned functions. Subsection (e) provides that "[n]o proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code." This vehicle that Congress chose for review is one that we have held should only be granted "in response to an act amounting to a judicial usurpation of power." *Patenaude*, 210 F.3d at 140. Petitioners have the burden to establish that they "have no other adequate means to attain the desired relief, and . . . that [their] right to the writ is clear and indisputable. . . . Even when these requirements are met, issuance of the writ is largely discretionary." *Id.* at 141. In this way, Congress granted substantial authority to the Panel to decide how the cases under its jurisdiction should be coordinated. It is significant that section 1407(a) directs that the Panel act "for the convenience of parties and witnesses and . . . promote the just and efficient conduct of such [civil] actions."

An even more compelling reason to adopt the Panel's interpretation is the public policy underlying the practice of severing punitive damages claims. In *Patenaude*, we quoted the transferee court's objectives in resolving the thousands of cases assigned to it – "that the sick and dying, their widows and survivors should have their claims addressed first." *Id.* at 139. The Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation accurately appraised the problem:

> "Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not [sic] permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages."

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation at 32 (March 1991).

Punitive damages are a windfall to the recipients over and above compensatory damages to which they are entitled. Indeed, in some jurisdictions, punitive damages are paid in part to the state rather than the individual plaintiff. *See* Alaska Stat. § 9.17.020(j); Ga.Code Ann. § 51-12-5.1(e)(2) (product liability cases); Utah Code Ann. § 78-18-1(3).

The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand. It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging

of available funds deprives current and future victims of rightful compensation.

Petitioners have failed to persuade us that the Panel ruling was erroneous. The petition does not demonstrate the extraordinary circumstances permitting us to issue a writ of mandamus, much less compel us to exercise our discretion and grant the request.

The petition for mandamus will be denied.

APPENDIX B

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district

judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by –

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed.

The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

Supreme Court, U.S.
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(2)

No. 00-1376

IN THE

Supreme Court of the United States

CARL GENE COLLINS and ROBERT W. PEUFFIER,

Petitioners,

v.

MACMILLAN-BLOEDEL, INC.; JOHN CRANE CO., INC.; and OWENS-ILLINOIS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT OWENS-ILLINOIS, INC.

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QUESTION PRESENTED FOR REVIEW

When a case is transferred for coordinated or consolidated pretrial proceedings under the multidistrict litigation statute, 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation must remand it to the original district "at or before the conclusion of such pretrial proceedings" (unless the case is resolved in the transferee district). The statute also expressly permits the Panel to "separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." If the Panel declines to remand a case upon request, Section 1407(e) makes its decision reviewable, but only by extraordinary writ under 28 U.S.C. § 1651. Here, the Panel remanded claims brought by the authorized representatives of the Petitioners' estates, but separated the punitive damage claims in those cases, on the ground that pretrial proceedings had not concluded with respect to such claims. The Third Circuit declined to issue a writ of mandamus. The questions presented on the Petition for Writ of Certiorari ("Petition") are

(1) whether the Petition should be dismissed because the named Petitioners died before the Petition was filed and the representatives of the Petitioners' estates waived any right to request review; and

(2) if the Petition is not dismissed, whether the Court of Appeals abused its discretion in denying mandamus, when

(a) the premise for the mandamus petition, that MDL 875 as a whole encompasses no legitimate multidistrict activity and is a failure, is demonstrably false; and

(b) the Petitioners' assertion that the Panel lacks the authority to sever punitive damages claims has no legal basis.

LIST OF PARTIES AND RULE 29.6 STATEMENT

There is no proper petitioner before the Court. The Petition names two petitioners, Carl Gene Collins and Robert W. Peuffier (the "Petitioners"). Neither Mr. Collins nor Mr. Peuffier was a party to the mandamus proceedings below. Indeed, both Petitioners died before the proceedings in the Third Circuit, and so could not be proper parties either there or before this Court.

The petitioners in the mandamus proceedings below (the "Mandamus Petitioners") were Mary Nell Collins ("Mrs. Collins," the personal representative of the estate of Mr. Collins), Marjorie Peuffier ("Mrs. Peuffier," the personal representative of the estate of Mr. Peuffier), and Barbara and Frederick Hoffman ("Mr. and Mrs. Hoffman;" Mr. and Mrs. Hoffman have apparently now dropped out of the proceedings). Mrs. Collins and Mrs. Peuffier cannot now join the Petition as petitioners because Supreme Court Rule 35.1 allows the representative of a deceased party to join a cert. petition by substitution only "[i]f a party dies *after* the filing of a petition for a writ of certiorari." (Emphasis added.)

Nor may Mrs. Collins and Mrs. Peuffier seek relief in this Court on any other basis. Supreme Court Rule 12.6 provides that "[a]ll parties to the proceedings in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court;" that "[a]ll parties other than the petitioner are deemed respondents;" and that "any respondent who supports the position of a petitioner" may file "a response supporting the petition," but such a response "shall be filed within 20 days after the case is placed on the docket, and that time will not be extended." Under Rule 12.6, Mrs. Collins and Mrs. Peuffier (as parties below

and not petitioners here) are deemed respondents, whose response supporting the Petition, if any, was due 20 days after the Petition was filed. They submitted no such response and therefore, under Rule 12.6's express terms, they "will not qualify for any relief from this Court."

The Petition is also flawed in its identification of the respondents. Under Supreme Court Rule 12.6, all parties in the proceeding below are respondents in this Court. The respondents in the mandamus proceeding below were (1) numerous defendants collectively represented by the Center for Claims Resolution ("CCR"); (2) GAF Corporation; and (3) MacMillan-Bloedel, Inc. Additionally, Owens-Illinois, Inc. (which had once been a defendant in the *Collins* and *Peuffier* cases, but had resolved them) appeared as an amicus curiae. *See* Petition, App. 1. The Petition is strikingly out of sync with the proceedings below. It names as Respondents Owens-Illinois (only an amicus below), John Crane Co., Inc. (not a party below), and MacMillan-Bloedel, Inc. (the only proper Respondent named[1]). The Petitioners neither named nor served the CCR respondents (the principal respondents below) or GAF (which is now in bankruptcy).

Although Owens-Illinois, as an amicus below, is not properly designated a respondent, it makes the following disclosure. Owens-Illinois is a publicly-held corporation. The following entities hold 10% or more of Owens-Illinois stock: KKR Associates, L.P. (23.1%); FMR Corp. (11.3%). Shares shown as owned by KKR Associates, L.P. are owned of record by three limited partnerships of which KKR Associates, L.P. is the sole general partner and as to which it

1. Owens-Illinois hereby joins the brief in opposition filed by MacMillan-Bloedel.

possesses sole voting and investment power. Owens-Illinois has received a Schedule 13G filed by FMR Corp., Edward C. Johnson 3d, Abigail P. Johnson and Fidelity Management & Research Company with respect to the shares of Common Stock identified as owned as of December 31, 1998 and in which such reporting persons assert dispositive and/or voting power with respect to portions of or all of such shares as a result of their direct or indirect investment advisory relationship to, or ownership interest in, various investment companies, institutional accounts or investment advisors which own such shares.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties and Rule 29.6 Statement	iii
Table of Contents	vi
Table of Cited Authorities	viii
Statement of the Case	1
A. Procedural History	1
B. The Creation and Success of MDL 875.	3
Reasons for Dismissing or Denying the Writ	9
I. The Writ Should be Dismissed Because No Party is Entitled to Relief Under the Petition.	9
II. If Not Dismissed Outright, the Writ Should be Denied.	12
A. The Third Circuit's Interpretation of Section 1407 Does Not Merit Review.	12
B. The Transferee Court's Treatment of Punitive Damages Claims Is Legitimate and Appropriate.	15

Contents

Page

1. Punitive Damage Claims Are Routinely Resolved With the Rest of the Claim. 16

2. The Remaining Punitive Claims Are Subject to Legitimate Pretrial Coordinated Proceedings. 17

a. Deferral of Punitive Claims. ... 17

b. Settlement of Punitive Claims. . 19

c. Resolution of Punitive Claims. . 19

C. Section 1407(a) Permits the Severance of Punitive Damages Claims. 21

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 19

B.M.W. of North America, Inc. v. Gore, 517 U.S. 559 (1996) 20

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 18

Dunn v. HOVIC, 1 F.3d 1371 (3d Cir.), *cert. denied*, 510 U.S. 1031 (1993) 20

Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973) ... 19

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983) 20

In re Asbestos Products Liability Litigation (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) 3, 18

In re Asbestos Products Liability Litigation (No. VI), 1996 WL 539589 (E.D. Pa. Sept. 16, 1996) 5, 6, 16, 18

In re Asbestos Products Liability Litigation (No. VI) (J.P.M.L. Sept. 30, 1996) 6

In re Asbestos Products Liability Litigation (No. VI) (J.P.M.L. May 20, 1998) 6, 7

Cited Authorities

	Page
In re Asbestos Products Liability Litigation (No. VI) (J.P.M.L. Feb. 5, 1999)	7
In re Cimino, No. 99-1217 (3d Cir. July 26, 1999)	8
In re Herbold, No. 00-1137 (3d Cir. May 31, 2000)	12
In re Northern Dist. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983)	20
In re the Custody of Testa, 1993 WL 88302 (D.C. Cir.), *cert. denied*, 508 U.S. 954 (1993)	13
In re Patenaude, 210 F.3d 135 (3d Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 565 (2000)	5, 8, 12, 14, 16, 17, 18, 19
In re Roberts, 178 F.3d 181 (3d Cir. 1999)	11
Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990)	20
Kerr v. United States District Court, 426 U.S. 394 (1976)	14
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)	19

ceased individuals whose representatives are not before the Court requesting relief. For these reasons MacMillan disputes that this Court has jurisdiction over the matter and asks that the writ be dismissed.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari should be denied because the proper parties have not sought relief and because the Third Circuit Court of Appeals correctly held that Mary Nell Collins and Marjorie Peuffier failed to meet the burden necessary for mandamus to issue. The Petitioner with claims related to MacMillan is Carl Gene Collins, the deceased husband of Mary Nell Collins, who allegedly sustained injury due to exposure to asbestos-containing products. Mary Nell Collins, individually and as personal representative of her husband's estate, is pursuing the underlying claims against MacMillan. Until recently, the entirety of Ms. Collins' claims were pending in the Eastern District of Pennsylvania ("MDL court" or "transferee court"). Upon motion for remand by Ms. Collins, the MDL court severed her punitive damage claim and recommended that all of her compensatory damage claims be remanded. The Judicial Panel on Multidistrict Litigation ("Panel") followed the MDL's court's suggestion and entered an order reflecting the decision, remanding non-punitive claims to the Northern District of Texas ("transferor court"). Ms. Collins moved the Panel to remand the punitive damages claim. MacMillan opposed remand of the punitive damage claims and all other claims, and filed a Motion to Vacate Conditional Remand Order and Brief. After oral argument on both parties' motions, the Panel denied Ms. Collins' motion to remand the punitive damage claim and remanded all non-punitive claims. Ms.

Collins filed a Petition for Writ of Mandamus in the Third Circuit Court of Appeals, which was denied. 233 F.3d 809; *see* Pet., Appendix ("App.") A. Subsequently, the deceased Carl Gene Collins and Robert W. Peuffier filed the Petition. MacMillan files this Brief in Opposition urging the Court to deny the Petition for Writ of Certiorari because the Petitioners lack standing and because the Panel acted properly in refusing to order the Panel to remand Ms. Collins' punitive damage claim.

REASONS FOR DENYING THE WRIT

A. Petitioners Do Not Have Standing to File Petition.

Petitioners are deceased and do not have standing to request relief from this Court. *See* SUP. CT. R. 12.6, 35.1, FED. R. CIV. P. 25. The parties who are plaintiffs in the trial court action and who were petitioners at the appellate court level are the representatives of the estates of Petitioners. They are not before the Court requesting relief. Since the petitioners are deceased and the estate representatives are absent from this proceeding, the Court should not hear the issues presented by Messrs. Collins and Peuffier.

B. There Are No Compelling Reasons for this Court to Review.

Petitioners have shown no compelling reason why this Court should grant their Petition. SUP. CT. R. 10. Neither the courts of appeal, the state courts of last resort nor the MDL regimes are in conflict. No important federal question is at issue. No court has departed from the usual course of proceedings. This appeal boils down to Petitioners' assertion

that the words "issue" and "claim" were incorrectly interpreted. Such a matter is hardly worthy of review by this Court.

C. The Judicial Panel's Action was Within Its Discretion.

As the Third Circuit Court of Appeals pointed out, "Congress intended transferee courts to have broad pretrial authority." *In Re Patenaude*, 210 F.3d 135, 144 (3d Cir. 2000). The language of the MDL statute provides broad discretion to the Panel by stating that orders will not be reviewed except by extraordinary writ. 28 U.S.C. § 1407(e); *see* Pet. at App. 10. Because of the high burden Congress chose to require, orders should only be reviewed in the event of "an act amounting to a judicial usurpation of power." *Patenaude* at 140.

The severance and retention of the claim for punitive damages in the MDL is within the broad authority and discretion of the Panel. Petitioners have failed to show that the Panel's action rose to the level of a usurpation of power.

D. Petitioners Have Failed to Establish a Right to a Mandamus Under Any Standard.

Petitioners' argument that the Third Circuit applied an incorrect rubric in evaluating the mandamus is inconsequential. Under any evaluation, whether statutory or common law, Petitioners have failed to establish the need for such an extraordinary writ. The Petition fails to do so, as did the appeal to the Third Circuit Court of Appeals.

Petitioners claim that a right to mandamus exists because of a "mistake" by the Panel in failing to exercise a "statutory

duty" to remand the punitive damage claim. Pet. at 3. However, no statutory duty to remand such a claim exists. As discussed in detail below, the Panel acted properly in retaining the punitive damage claim in the MDL. There is therefore no "clear and indisputable" right to such a remand and thus no grounds for mandamus. *Patenaude* at 140.

Furthermore, Petitioners have failed to show that there are no other adequate means to obtain the desired relief. *Patenaude* at 140. The punitive damage claim has not been eliminated, merely severed and retained in the MDL. Petitioners therefore have an adequate avenue of recovery for that claim. Moreover, retention of the punitive damage claim serves the purposes of the Multiparty, Multiforum Acts of 1990 and 1991 upon which Petitioners rely; it guards against "the risk of inappropriate, multiple punitive damage awards." Pet. at 7, citing H.R. Rep. 101-515, H.R. Rep. No. 515, 101st Cong., 2nd Sess. (June 1, 1990) and H.R. Rep. 102-373, H.R. Rep. No. 373, 102nd Cong., 1st Sess. (Nov. 25, 1991).

Notwithstanding Petitioners' unsupported statement that the MDL "has . . . prevented the vast majority of . . . cases from reaching trial. . . ," Pet. at 1-2, the system has in fact been efficient. As of 1996, approximately 40,000 of the 62,000 cases assigned to MDL 875 had been resolved, and thousands of the remaining 22,000 cases had been resolved but not yet dismissed. *Patenaude* at 140. In 1997 and 1998, the MDL court closed nearly 10,000 cases per year. *Id.* These numbers demonstrate that MDL 875 provides an adequate alternate means of pursuing Collins' claim for punitive damages.

Petitioners also claim the MDL results in delay. Pet. at 1. Even assuming the allegations were true, Petitioners have not shown an immediate need for pursuing the punitive damage claim. By definition, punitive damages are intended to punish a defendant for its wrongful actions and to deter future misconduct, rather than to compensate the injured party. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Such damages may be a windfall to a fully compensated plaintiff. *Newport* at 267. One author endorsing separate trials for punitive and compensatory claims has stated:

> A plaintiff enjoys no individual entitlement to punitive damages commensurate with his right to be compensated for his injury. . . . [T]he trier of fact awards punitive damages not to compensate the plaintiff as an individual, but to punish the defendant and to protect society as a whole. Depriving an individual mass tort plaintiff of control over the prosecution of a punitive damage claim does not, therefore, significantly interfere with the traditional freedom accorded litigants in personal injury litigation.

R. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 846 (1985)(footnotes omitted). Therefore, even if there is a delay in pursuing the punitive damage claim, Petitioners will not be harmed or denied the opportunity to recover compensation. Moreover, the Panel's decision does not delay Petitioners from pursuing their compensatory claims; on the contrary, the Panel's decision hastens the determination of those claims.

Petitioners have likewise failed to address an additional burden required by the Panel. Specifically, a movant bears a heavy burden of persuasion absent a suggestion of remand from the Panel. J.P.M.L. Rule 7.6(d); *In re Air Crash Disaster in Ionian Sea*, 438 F.Supp. 932, 934 (Jud. Pan. Multi. Lit. 1977). In the pending action there is no suggestion of remand from the transferee court with respect to the punitive damage claim. In fact, the transferee court considered Collins' motion to remand punitive damages, and denied it. The Panel has recognized "the significance of the transferee judge's view, as the firsthand judicial observer." *In re Air Crash Disaster* at 934. MacMillan asks this Court to consider the view of Judge Weiner, who suggested the punitive damages claims be retained in MDL 875. Absent a suggestion of remand from him, Petitioners bear a heavy burden of persuasion, which they have failed to meet.

E. The Judicial Panel Acted Properly in Retaining the Claims for Punitive Damages Pursuant to the Controlling Statute and the Federal Rules of Civil Procedure.

Petitioners argue that the Panel has no statutory authority under 28 U.S.C. § 1407 to retain punitive damage claims in the MDL because they are "issues" rather than "claims" Pet. at 4-11. In doing so, Petitioners resort to verbal gymnastics to fashion a confusing and awkward "plain meaning" of the word "claim" which does not include claims for punitive damages. Petitioners' convoluted argument is essentially that since a punitive damage prayer is an "issue" and the word "issue" is not listed in the statute, the Panel acted in violation of the plain meaning of § 1407. The Third Circuit Court of Appeals disagreed with Petitioners' contrived defi-

nition and found that "claim" did encompass punitive damages. 233 F.3d 809; *see* Pet. at App. 4.

This Court need not even reach the issue of classifying punitive damages as an "issue" or a "claim." The only action of the Panel which is up for review is the remand of Petitioners' compensatory claims. It was Judge Weiner of the MDL court, rather than the Panel, who severed the punitive damages claims from the other claims in the case. Pursuant to FED. R. CIV. P. 42(b), Judge Weiner did not exceed his authority, nor do Petitioners so claim. FED. R. CIV. P. 42(b) (granting district courts authority to "order a separate trial of any claim . . . or of any separate issue . . . ."). The Panel merely ordered the remand of the compensatory claims, retaining the remainder of the action in the MDL. The plain language of § 1407 clearly authorizes the Panel to remand "any claim" prior to the remand of "remainder of the action." 28 U.S.C. § 1407(a). Even Petitioners do not contend that the compensatory claims which were remanded do not qualify as "claims." Thus the Panel's remand of the compensatory claims conforms to the "plain language" of § 1407 upon which Petitioners base their argument. The severance by Judge Weiner and the remand by the Panel are consistent with the plain language of § 1407(a) and are appropriate pursuant to FED. R. CIV. P. 42(b). Petitioners have failed to show that any action of the Panel was contrary to the statute, much less a judicial usurpation of power.

MacMillan must nevertheless respond to the hairsplitting argument that punitive damages are only an "issue" and not a "claim." Petitioners' argument ignores the fact that punitive damages have the features of "claims" rather than "issues." A claim for punitive damages requires independent elements

of proof and the possibility of a heightened burden of proof. *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1580 (6th Cir. 1985) (quoting Owens, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1269-71 (1976)); *see also Bright v. Land O'Lakes, Inc.*, 844 F.2d 436, 439 (7th Cir. 1988). Punitive damages may be tried separately from other claims in a case and before separate juries. *E.g., Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 599-600 (4th Cir. 1996); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986); *Scheufler v. General Host Corp.*, 895 F.Supp. 1411, 1413-15 (D. Kan. 1995); *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 505 (8th Cir. 1998); *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 517 (7th Cir. 1997); *Central Office Tel., Inc. v. AT&T*, 108 F.3d 981, 994 (9th Cir. 1997), *rev'd on other grounds*, 118 S.Ct. 1956 (1998). These features of punitive damages render them analogous to "claims" rather than "issues." Furthermore, isolated references to punitive damages as "issues" do not exclude them from the plain meaning of the word "claim." Such references are simply irrelevant to the statute at issue because the terms "issue" and "claim" are not mutually exclusive. Of far greater significance is the fact that Petitioners cite no cases or literature excluding punitive damages from the definition of "claim."

Petitioners assert that punitive damage claims are not "claims" under § 1407 because they are not a separate cause of action for which a plaintiff may sue. Pet. at 7-9. This argument fails because many types of claims exist which may not be sued on separately. One example, a loss of consortium claim, has been described as a "dependent claim based on liability to the injured spouse. . . ." *Doe v. Nevada Crossing, Inc.*, 920 F.Supp. 164, 169, n.5 (D. Utah 1996)

(citing *Madison v. Deseret Livestock Co.*, 574 F.2d 1027 (10th Cir. 1978)). Though it is derivative of a spouse's substantive claims, a loss of consortium claim is a separate and distinct claim for relief. *Id.*; *see also Curato v. Saluti*, 2000 WL 1974 at *8 (E.D. Pa. Dec. 30, 1999). A leading treatise on punitive damages has similarly described punitive claims as dependent claims for relief:

> [T]he weight of authority is that punitive damages do not constitute an independent cause of action. Punitive damages are awarded 'incident to' a basic cause of action.... [W]hile punitive damages, under the general rule, do not constitute an independent claim which can be pleaded and proved alone, authority supports the conclusion that such damages constitute a dependent *claim* for relief which must be supported by independent allegations and proof.

James D. Ghiardi, *et al., Punitive Damages: Law & Practice* § 12.07 at 22-23, 25 (1999) (citing authorities) (emphasis added). Therefore, the Panel's order to remand all claims except Petitioners' dependent claims for punitive damages is fully consistent with the plain meaning of the term "claim" in § 1407(a). Since the Panel's actions were proper pursuant to the statute, there was no judicial usurpation of authority warranting mandamus.

F. Policy Consideration Support Denying the Writ.

Even if Ms. Collins and Ms. Peuffier had met the burden required for mandamus, policy considerations dictate that the writ of mandamus should not have issued. The *Patenaude* court held that: "[I]t is within a court's discretion to refrain

from issuing the writ even when the requirements for mandamus are technically satisfied. The availability of the writ does not compel its exercise." *Patenaude* at 141 (quoting *In re Chambers Dev. Co.*, 148 F.3d at 223); *see also Hahnemann v. Edgar*, 74 F.3d 456, 461 (3d Cir. 1996); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 482 (3d Cir. 1995); *Lusardi v. Lechner*, 855 F.2d 1062, 1070 (3d Cir. 1998). In the instant case, ample policy reasons justified the Third Circuit Court of Appeals' use of its discretion to deny the writ regardless of whether Petitioners met their burden.

It is the policy of the MDL court for punitive damages claims to remain in MDL 875 until it is clear that other claimants will not be harmed by their adjudication. This conserves monetary resources for those claimants who have not yet had their day in court. The Panel described the policy when it issued its order establishing MDL 875 in 1991. It cited the concern that there may be "insufficient funds to fairly compensate all deserving claimants," and suggested that the concern be addressed before plaintiffs "go to trial and secure recoveries (often including punitive damages) at the possible expense of deserving plaintiffs in other cases. *In re Asbestos Products Liability Litigation (No. IV)*, 771 F.Supp. 415, 422 (Jud. Pan. Multi. Lit. 1991). As a possible solution, the Panel suggested that some claims could be remanded in advance of others at the suggestion of the MDL court. *Id.*

Judge Weiner touched upon such policy issues when he expressed the MDL court's "concern over the continued viability of the defendants, particularly with an unknown quantity of future injuries brought about due to the latency of asbestos-related diseases. The loss of any defendant to bank-

ruptcy shifts a greater burden to the remaining defendants." *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL No. 875, 1996 WL 539589 (E.D. Pa. Sept. 16, 1996) (footnote omitted). Similarly, Judge Weis of the Third Court of Appeals described the situation in 1993, when he stated that "the available resources of asbestos manufacturers will be exhausted before all deserving claimants have received their compensatory damages." *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993) (*en banc*) (Weis, J., dissenting) (footnote omitted).

Petitioners would have the Court grant them special dispensation at the expense of thousands of other MDL claimants. Due to the large volume of asbestos cases and the growing number of bankrupt defendants, providing compensatory damages to claimants is becoming increasingly difficult. For example, in a recent Texas Supreme Court case, two of three defendant companies, Pittsburgh Corning and Owens-Corning, filed for bankruptcy following oral argument and submission of the case. *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 645 (Tex. 2000). Severing and deferring punitive claims until compensatory claims are satisfied is even more important now than when the policy was first addressed. Mandamus is hardly the appropriate vehicle for overriding established policy considerations and achieving such special treatment.

The Panel's practice of remanding non-punitive claims that are severed by Judge Weiner while retaining punitive claims is additionally consistent with the policy of § 1407(a). The Panel is prevented from dividing a single claim between two courts because it "violates well settled principles of judicial management." Dividing a single claim among two

courts could lead to confusion and conflicting rulings by those courts. *In re Plumbing Fixtures Cases*, 298 F.Supp. 484, 495 (Jud. Pan. Multi. Lit. 1968).

Severing and retaining punitive damages in MDL 875 does not raise such concerns. Under the Panel's order, a single claim for relief is not split between two courts; rather, the claim for punitive damages is separated from the compensatory claims. The punitive claim will not be pursued without appropriate findings of liability in the trial court. As discussed previously, federal courts have repeatedly found it permissible to try punitive damages claims to separate juries. Therefore, there is no risk of inconsistent rulings by two district courts.

The practice of severing and retaining punitive damage claims in the MDL promotes the above policies. The Third Court of Appeals' denial of the writ of mandamus was appropriate. Therefore, the Petition for Writ of Certiorari sought by Petitioners should be denied, regardless of whether this Court finds that Petitioners' estates' representatives met their heavy burden of persuasion.

CONCLUSION

Carl Gene Collins and Robert W. Peuffier are deceased, and the proper parties are not seeking relief from this Court. Furthermore, the issue presented does not merit consideration by this Court. The standard for obtaining the extraordinary relief of mandamus is demanding. Petitioners, by resorting to a convoluted reading of 28 U.S.C. § 1407 and a strained definition of the word "claim," fall far short of that burden. Petitioners' right to the writ is not clear and indisputable because the Panel acted properly and within its discretion in remanding compensatory claims and retaining the punitive claims in MDL 875. The Panel's actions were in accord with statute, federal rules and policy considerations. The Petition for Writ of Certiorari should be denied because the Third Circuit Court of Appeals acted properly in denying the Petition for Writ of Mandamus.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
MAY 3 2001
OFFICE OF THE CLERK

(3)

No. 00-1376

IN THE

Supreme Court of the United States

CARL GENE COLLINS, ROBERT W. PEUFFIER,

Petitioners,

v.

MACMILLAN-BLOEDEL, INC.,
JOHN CRANE CO., INC., and OWENS-ILLINOIS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MACMILLAN-BLOEDEL, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

May the Judicial Panel on Multidistrict Litigation ("MDL") remand a cause of action to a district court for trial while retaining the claim for punitive damages in the MDL?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners

Carl Gene Collins, deceased

Robert W. Peuffier, deceased

Respondents

MacMillan-Bloedel, Inc., defendant in *Mary Collins v. MacMillan Bloedel, Inc.*

John Crane Co., Inc.

Owens-Illinois, Inc.

Other Defendants Below

The Flintkote Company, cross-defendant in *Mary Collins v. MacMillan Bloedel, Inc.*

Plaintiffs Below

Mary Nell Collins, Individually and as Personal Representative of the Heirs and Estate of Carl Gene Collins

Marjorie Peuffier, Individually and as Personal Representative of the Heirs and Estate of Robert W. Peuffier

Other Related Parties

Barbara and Frederick Hoffman, petitioners in the Third Circuit Court of Appeals

Rule 29.6 Disclosure

Pursuant to Supreme Court Rule 29.6, MacMillan-Bloedel, Inc. makes the following disclosures: 1) MacMillan-Bloedel, Inc. is now known as Weyerhaeuser Packaging, Inc.; 2) Weyerhaeuser Packaging, Inc. is owned by Weyerhaeuser (USA), Inc. which is owned by Weyerhaeuser Company; and 3) Weyerhaeuser Company is publicly traded.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding and Rule 29.6 Disclosure ii

Table of Contents iv

Table of Authorities v

Statement of Jurisdiction 1

Statement of the Case 2

Reasons for Denying the Writ 3

A. Petitioners Do Not Have Standing to File Petition 3

B. There Are No Compelling Reasons for this Court to Review 3

C. The Judicial Panel's Action was Within Its Discretion 4

D. Petitioners Have Failed to Establish a Right to a Mandamus Under Any Standard 4

E. The Judicial Panel Acted Properly in Retaining the Claims for Punitive Damages Pursuant to the Controlling Statute and the Federal Rules of Civil Procedure 7

F. Policy Consideration Support Denying the Writ 10

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587 (4th Cir. 1996) 9

Bright v. Land O'Lakes, Inc., 844 F.2d 436 (7th Cir. 1988) 9

Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985) 9

Central Office Tel., Inc. v. AT&T, 108 F.3d 981 (9th Cir. 1997), *rev'd on other grounds*, 118 S.Ct. 1956 (1998) 9

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 6

Curato v. Saluti, 2000 WL 1974 (E.D. Pa. Dec. 30, 1999) 10

Denesha v. Farmers Ins. Exch., 161 F.3d 491 (8th Cir. 1998) 9

Doe v. Nevada Crossing, Inc., 920 F.Supp. 164 (D. Utah 1996) 9

Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) (*en banc*) Weis, J., dissenting) 12

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6

Glenmede Trust Co. v. Thompson, 56 F.3d 476 (3d Cir. 1995) 11

Hahnemann v. Edgar, 74 F.3d 456 (3d Cir. 1996).....11

In re Air Crash Disaster in Ionian Sea, 438 F.Supp. 932 (Jud. Pan. Multi. Lit. 1977).....7

In re Asbestos Products Liability Litigation (No. IV), 771 F.Supp. 415 (Jud. Pan. Multi. Lit. 1991).....11

In re Asbestos Products Liability Litigation (No. VI), MDL No. 875, 1996 WL 539589 (E.D. Pa. Sept. 16, 1996).....12

In re Chambers Dev. Co., 148 F.3d at 223.....11

In re Patenaude, 210 F.3d 135 (3d Cir. 2000).....4, 5, 10, 11

In re Plumbing Fixtures Cases, 298 F.Supp. 484 (Jud. Pan. Multi. Lit. 1968).....13

Jannotta v. Subway Sandwich Shops, Inc., 125 F.3d 503 (7th Cir. 1997).....9

Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986).....9

Lusardi v. Lechner, 855 F.2d 1062 (3d Cir. 1998).....11

Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978).....10

Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643 (Tex. 2000).....12

Scheufler v. General Host Corp., 895 F.Supp. 1411(D. Kan. 1995).....9

Statutes:

28 U.S.C. § 1407 ..... 7, 8, 9, 14

28 U.S.C. § 1407(a) 8, 10, 12

28 U.S.C. § 1407(e) 4

Rules:

FED. R. CIV. P. 25 ..... 1, 3

FED. R. CIV. P. 42(b) 8

JUD. PAN. MULTI. LIT. RULE 7.6(d) 7

SUP. CT. R. 10 3

SUP. CT. R. 12.6 ..... 1, 3

SUP. CT. R. 35 1

SUP. CT. R. 35.1 ..... 1, 3

Other Authorities:

H.R. Rep. 101-515, H.R. Rep. No. 515, 101st Cong., 2nd Sess. (June 1, 1990) 5

H.R. Rep. 102-373, H.R. Rep. No. 373, 102nd Cong. 1st Sess. (Nov. 25, 1991) 5

James D. Ghiardi, *et al.*, *Punitive Damages: Law & Practice*, §12.07 at 22-23, 25 (1999) 10

Owens, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1269-71 (1976) 9

Trangsrud, *Joinder Alternative in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 846 (1985).....6

STATEMENT OF JURISDICTION

MacMillan-Bloedel, Inc. ("MacMillan") is a defendant in a lawsuit originally filed by Carl Gene Collins. Following Mr. Collins' death, Mary Nell Collins now pursues the claims at the trial court level, both individually and as personal representative of the heirs and estate of Carl Gene Collins. MacMillan is not a party to any claim filed by Mr. Peuffier or his estate.

MacMillan disputes that this Court has jurisdiction over the present matter. Petitioners are two deceased men, Carl Gene Collins and Robert W. Peuffier. Petition for Writ of Certiorari ("Pet.") at 2. Furthermore, Messrs. Collins and Peuffier were not parties to the proceeding in the court whose judgment is sought to be reviewed and are not entitled to file documents with this Court. SUP. CT. R. 12.6. The action in the lower appellate court was pursued by Mary Nell Collins and Marjorie Peuffier, the personal representatives of the two deceased men. Since neither representative has timely filed a document with this Court, they are not entitled to relief. *Id.* There is no petitioner requesting relief over whom the Court may exercise jurisdiction.

Supreme Court Rule 35 addresses the issue of the death of a party which occurs after that party files a petition for writ of certiorari. It requires that a representative be named for the deceased party. If the representative is not substituted, the moving party is entitled to have the petition for writ of certiorari dismissed. SUP. CT. R. 35.1. Additionally, FED. R. CIV. P. 25 states that an action as to a deceased party may be dismissed if the motion for substitution is not made 90 days after death is suggested upon the record. In this analogous situation, MacMillan is faced with a petition filed by de-

Cited Authorities

	Page
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	21
Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir. 1994)	14
Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir. 1990)	20
Statutes:	
28 U.S.C. § 1291	14
28 U.S.C. § 1407	i, 3, 12, 18, 21
28 U.S.C. § 1407(a)	3, 14, 15, 21, 22, 23
28 U.S.C. § 1407(e)	i, 13
28 U.S.C. § 1651	i
28 U.S.C. § 2101(c)	11
Rules:	
Fed. R. Civ. P. 42(b)	22
Supreme Court Rule 10	12
Supreme Court Rule 10(a)	12

Cited Authorities

	Page
Supreme Court Rule 10(c)	12
Supreme Court Rule 12.3	11
Supreme Court Rule 12.4	9
Supreme Court Rule 12.6	iv, 10, 11
Supreme Court Rule 13.2	11
Supreme Court Rule 35.1	10, 11

Other Authorities:

C. Wright & A. Miller, 15 Federal Practice & Procedure § 3866 (2d ed. 1986 & Supp. 2000)	19
United States Senate Judiciary Committee on S. 3815, 89th Cong. 2d Sess. (Oct. 20-21, 1966)	18, 19

STATEMENT OF THE CASE

The Petition for writ of certiorari stems from the latest in a series of mandamus petitions filed by asbestos plaintiffs' counsel seeking to challenge the remand practices within MDL 875, the multidistrict litigation proceedings concerning all federal asbestos-related personal injury and wrongful death cases. The Petition specifically challenges the Panel's practice of severing and retaining in MDL 875 claims for punitive or exemplary damages. The Panel followed this practice because coordinated and consolidated pretrial proceedings have not been concluded with respect to such claims, and remand is proper only for compensatory damage claims.

A. Procedural History

MDL 875 is the pretrial consolidation of all federal asbestos-related personal injury and wrongful death claims, before Hon. Charles R. Weiner in the Eastern District of Pennsylvania. It was established in 1991 by the Judicial Panel on Multidistrict Litigation in response to a judicial "asbestos crisis." The Petitioners' claims are among the more than 70,000 cases (many of which have multiple plaintiffs) that have been transferred to MDL 875.

Despite the fact that, under Judge Weiner's stewardship, more than 72% of all asbestos claims in MDL 875 have been resolved, the Petitioners assert that MDL 875 is ineffective. Against this backdrop, the Petitioners challenge whether the Panel, at the suggestion of Judge Weiner, has the power to remand compensatory damage claims to the transferor courts without also remanding any claims for punitive damages at the same time.

The Mandamus Petitioners requested that Judge Weiner suggest remand of their claims, including for punitive damages. Judge Weiner suggested remand of the compensatory claims, but not the claims for punitive damages.

The Mandamus Petitioners then asked the Panel to remand their claims, including the claims for punitive damages. The Panel declined, on the grounds that (1) MDL 875 continues to encompass coordinated pretrial proceedings concerning punitive damages claims and (2) whenever Judge Weiner "deems remand of the punitive damages claims in [these cases] appropriate, procedures are available whereby this may be accomplished with a minimum of delay." *See* 11/30/99 Panel Order in *Peuffier* (Mandamus Pet. Ex. N) at 2; 12/01/00 Panel Order in *Collins* (Mandamus Pet. Ex. O) at 2 (same).

The Mandamus Petitioners then sought a writ of mandamus from the Third Circuit to compel the Panel to order remand. The Third Circuit declined to order this extraordinary remedy, finding that no clear entitlement to it existed and the Panel had not egregiously erred. App. 3-7.

Now the Petitioners (but not the Mandamus Petitioners) ask this Court to review the Third Circuit's decision. They name as respondents not only MacMillan-Bloedel, but two parties who were not named below: Owens-Illinois (which appeared only as an amicus) and John Crane (which did not appear at all). They do not name as respondents other parties below, including the CCR defendants who were the principal respondents in the mandamus proceedings.

The Petitioners contend that the Third Circuit misconstrued 28 U.S.C. § 1407 by holding that the proviso of Section 1407(a), which expressly permits the Panel to remand only a portion of a case, does not permit the Panel to sever and retain in the transferee court claims for punitive damages. They assert that punitive damages are "issues" rather than "claims" and that such "issues" may not be severed and retained under Section 1407(a). Pet. 3-11.

As a threshold issue, neither the Petitioners nor the Mandamus Petitioners are entitled to relief. As noted in the List of Parties section above, the Petitioners cannot secure relief in this Court because they are deceased and were not even parties below, and the Mandamus Petitioners have forfeited any right to seek relief.

Aside from issues of standing, the issue presented in this case is not one of great importance meriting review, and in any event the Third Circuit's challenged holding is plainly correct. Nor is the Petitioners' factual contention that MDL 875 is a failure (which has been considered and rejected by no less than three courts) the kind of question worthy of review on certiorari.

B. The Creation and Success of MDL 875.

MDL 875 was created in 1991 in response to an asbestos litigation crisis in the federal courts. The Panel responded to the plea of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (the "Rehnquist Commission") that "'the federal judiciary must itself act now to achieve the best performance possible from the system under current law.'" *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415, 420 (J.P.M.L. 1991), *quoting* Report of the Rehnquist Commission (March 1991) at 4.

Judge Weiner's performance as transferee judge in MDL 875 has been seriously mischaracterized by the Petitioners. The Administrative Office of the U.S. Courts, in its report surveying the five-year period through FYE September 30, 1997, observed:

> In July 1991, an order was issued transferring asbestos cases to the Eastern District of Pennsylvania (PA-E). As of September 30, 1997, 69,038 cases had been filed in or transferred to PA-E. In addition to closing more than 44,723 of those cases, the presiding judge has closed over 72 percent of the 4,231,123 claims encompassed in the 69,087 cases gathered in the transferee district, orchestrated settlements with respect to unfiled claims, and facilitated settlements of claims in several state court jurisdictions at the request of state court judges.
>
> . . . .
>
> . . . Judge Weiner of the Eastern District of Pennsylvania was able to close 6,168 asbestos cases this fiscal year, compared to an average of 385 civil cases per authorized judgeship.

Federal Judicial Caseload: A Five-Year Retrospective (available at www.uscourts.gov) at 7, 8.

Indeed, MDL 875 has been successful in ways beyond those noted in the Administrative Office's report. More recently, nearly 10,000 cases per year have been closed. *Id.* at 9. In denying a 1996 request that he suggest wholesale remand of transferred cases, Judge Weiner not only described

the procedures under which the parties had settled many current cases (then 40,000 out of 62,000 cases) and agreed on a claims handling process for future claims, but also noted that thousands of additional cases had been resolved in fact, though the paperwork had not been completed. *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 539589, at *1 & n.3 (E.D. Pa. Sept. 16, 1996).[2] Judge Weiner noted that "[a]ll counsel who have cooperated with each other and have diligently pursued their cases and claims, and have sought the aid of the Court, have achieved a successful conclusion for their clients." *Id.* at *3.

There is no evidence that the transferee court has unreasonably determined the necessity of further pretrial proceedings. As the Third Circuit noted in *In re Patenaude*, 210 F.3d 135, 140 (3d Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 565 (2000), Judge Weiner *has* suggested remand of approximately 1,000 cases in which he judged the pretrial procedures to be exhausted. Judge Weiner has noted that in such cases "all but one or two defendants" typically have

2. Judge Weiner explained the paperwork lag:

> Many of the plaintiffs' counsel, and certainly most of the defendants, are engaged in thousands of cases. When settlement occurs, medical and exposure details may still need to be provided, releases must be signed, and frequently, the payout period may extend for several years. The last matter tended to by counsel is usually the submission of a dismissal order. As a result, the Court often finds that cases which remain on the dockets with seemingly large numbers of remaining defendants are either settled completely or have only one or two actual claims remaining.

Id. at *1 n.3.

settled or been dismissed by the time of remand, "and then, they routinely settle in total without trial. Of the very few trials which have actually occurred following transfer, a number have resulted in defense verdicts." *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 539589, at *1 n.2.

The Judicial Panel on Multidistrict Litigation has commended Judge Weiner's continuing success in MDL 875. Several times it has denied motions for broad-scale remand to the transferor courts, absent Judge Weiner's suggestion, because his great success in handling MDL 875 has earned him deference in judging when the coordinated pretrial process was exhausted and remand was appropriate. *See In re Asbestos Products Liability Litigation (No. VI)*, at 2 (J.P.M.L. Sept. 30, 1996) (denying motions to remand all MDL 875 cases, or certain Florida cases) (3d Cir. Supp. App. 21);[3] *In re Asbestos Products Liability Litigation*

3. In this opinion, the Panel commended Judge Weiner's success in "(i) prioritizing serious disease cases, (ii) encouraging settlements, (iii) reducing transactions costs, and (iv) protecting the continued viability of defendants." *Id.* at 2.

The Petitioners claim that in prioritizing serious disease cases, Judge Weiner has refused to accelerate any case unless it involves a claimed malignancy. Pet. at 2. They cite nothing to support this assertion, with good reason. MDL 875 Administrative Order No. 3 allows acceleration of any serious case, whether or not involving malignancy.

The shared concern of the Third Circuit, the Panel, and Judge Weiner about the "continued viability of defendants" was, and remains, valid. Before MDL 875, 70% of asbestos product manufacturers, by market share, were in bankruptcy. During the

(Cont'd)

(No. VI), at 2 (J.P.M.L. May 20, 1998) (denying motion to remand certain Oregon cases, noting that by May 5, 1998 Judge Weiner had closed 53,687 cases and returned 976 cases, including 29 Oregon cases, to the transferor courts); *In re Asbestos Products Liability Litigation (No. VI)*, at 2 (J.P.M.L. Feb. 5, 1999) (denying motion to remand certain New York and Georgia cases, noting that Judge Weiner had closed nearly 60,000 cases and returned nearly 1,000 cases, including 15 New York and 3 Georgia cases, to the transferor courts).

The Third Circuit has also repeatedly recognized the success of MDL 875. In 1999, the court noted:

> Judge Weiner . . . has had great success in handling the tsunami of asbestos cases sent his way. Almost 27,000 cases were initially consolidated in 1991. Since then, including the addition of tag-along cases, he has disposed of nearly 60,000. Also, nearly 1,000 actions or claims have been returned to their original transferor districts. Judge Weiner has proven himself an able manager of litigation that at every level has been

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first seven years of MDL 875, no further bankruptcies of asbestos defendants occurred. Even with Judge Weiner's successful efforts to coordinate the federal asbestos litigation, however, more major asbestos defendants have recently become insolvent and filed for bankruptcy protection, including in the past eighteen months GAF Corporation, Owens Corning, Fibreboard, Armstrong World Industries, W.R. Grace, Babcock & Wilcox, and Pittsburgh Corning Corporation. In these circumstances, coordination of the litigation is especially important.

> described as vexing. . . . The "just and efficient conduct" of the actions will therefore be well served by . . . transfer to [Judge Weiner's] watch.

In re Cimino, No. 99-1217, slip op. at 9 (3d Cir. July 26, 1999). In *Patenaude*, the court again noted Judge Weiner's success:

> This process has resulted in numerous cases being resolved. As of late 1996, some 62,000 cases had been assigned to MDL 875 and approximately 40,000 had been resolved. The remaining 22,000 cases included thousands of cases that had been resolved but not yet dismissed. As of January 1999, nearly 60,000 cases had been closed. Thus, in 1997 and 1998, the transferee court closed nearly 10,000 cases a year.

210 F.3d at 140 (internal citations omitted).

In its decision below, the court commended the efforts by Judge Weiner and the Panel to ensure that limited assets are available to help individuals who have been injured:

> Punitive damages are a windfall to the recipients over and above compensatory damages to which they are entitled. Indeed, in some jurisdictions, punitive damages are paid in part to the state rather than the individual plaintiff.
>
> The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is

> accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent consideration more than vindicates the Panel's decision to withhold punitive damage claims on remand. It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.

App. 6-7.

REASONS FOR DISMISSING OR DENYING THE WRIT

I. The Writ Should be Dismissed Because No Party is Entitled to Relief Under the Petition.

The Petitioners are not proper parties in this proceeding. Only "parties" in the proceedings below can properly petition this Court for a writ of certiorari. Supreme Court Rule 12.4 provides:

> Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition.

The Petitioners, Mr. Collins and Mr. Peuffier, were not parties to the mandamus proceedings below; indeed, both

had died before the petition for writ of mandamus was filed. Because they were not parties, they are not entitled to petition this Court for relief.

Nor can the representatives of Mr. Collins' and Mr. Peuffier's estates now press this Petition. The Petitioners' widows, Mrs. Collins and Mrs. Peuffier, who appeared below as Mandamus Petitioners both individually and as the representatives of their husbands' estates, cannot seek relief. Under Supreme Court Rule 12.6, these Mandamus Petitioners, as parties below, were "deemed parties entitled to file documents in this Court." Rule 12.6 deems all such parties aligned with the Petitioners (who appeared below but did not themselves join the certiorari petition) as "respondents who support[] the position of a petitioner," and requires them to file a response "supporting the petition . . . within 20 days after the case [was] placed on the docket." Rule 12.6. They did not do so. Rule 12.6 expressly provides that, as a consequence, they "will not qualify for any relief from this Court."

Nor may the Mandamus Petitioners now substitute for the Petitioners in order to press this Petition. Supreme Court Rule 35.1 defines and limits the circumstances in which the representatives of an estate may be substituted for deceased petitioners. It provides that "[i]f a party dies *after* the filing of a petition for writ of certiorari . . . , the authorized representative of the deceased party may appear and, on motion, be substituted as a party." Rule 35.1 (emphasis added). Here, the purported Petitioners died *before* the Petition was filed — indeed, before the underlying proceedings before Judge Weiner, the Panel, and the Third Circuit even commenced. Rule 35.1 therefore does not allow substitution now. On the contrary, it suggests that the

proceedings must be dismissed. *See* Rule 35.1 ("If the representative [of the estate of a deceased party] fails to become a party" the opposing party "is entitled to have the petition for a writ of certiorari . . . dismissed;" "If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.").

The timely filing of a petition for a writ of certiorari is jurisdictional. *See* Supreme Court Rule 13.2; 28 U.S.C. § 2101(c). Because a timely petition was not filed by any party to the proceedings below, and because the Petition that was filed cannot be pressed by any party, the Petition should be dismissed.[4]

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4. As noted in the List of Parties above, the Petitioners' misidentification of the proper parties extends to the respondents. The CCR defendants (the principal respondents below), were neither named nor served, contrary to Rules 12.3 and 12.6. John Crane did not appear in the Third Circuit in any capacity, and so is not a proper respondent under Rule 12.6. Owens-Illinois appeared in the Third Circuit, but only as an amicus, and so is not a proper respondent either.

Owens-Illinois was originally a party in these cases, but resolved them prior to the filing of the petition for writ of mandamus. The Third Circuit granted Owens-Illinois leave to proceed as amicus curiae. It is unclear why Owens-Illinois has been named as a respondent before this Court. Nonetheless, while it has resolved these cases, Owens-Illinois has a continuing interest in the issues presented here.

Owens-Illinois, which has been named as a defendant in tens of thousands of asbestos personal injury cases, was a respondent in two of the prior mandamus proceedings (*In re Roberts*, 178 F.3d 181 (3d Cir. 1999) (denying petition for writ of mandamus), and (Cont'd)

II. If Not Dismissed Outright, the Writ Should be Denied.

Certiorari is reserved for cases presenting exceptionally important issues, such as when there is a split of authority or the lower court strayed from this Court's prior holdings. This is not such a case. The issue presented — whether the Third Circuit legally erred in denying mandamus — involves no split of authority. Mandamus is an exceptional remedy, rarely granted. The Third Circuit's decision was completely consistent with Section 1407.

A. The Third Circuit's Interpretation of Section 1407 Does Not Merit Review.

Supreme Court Rule 10 provides that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." None of the bases typically invoked for certiorari review applies here. The Third Circuit's decision does not conflict with a decision of any other Court of Appeals or of this Court. *See* Rule 10(a). Nor did the Third Circuit depart from the "accepted and usual course of judicial proceedings" or "sanction[] such a departure by a lower court" so as to call for this Court to exercise its supervisory power. *Id.* Nor does the issue present an important question of federal law that has not been, but should be, settled by this Court. *See* Rule 10(c). Indeed, there is no argument that

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(Cont'd)

In re Patenaude, 210 F.3d 135 (3d Cir.) (same), *cert. denied*, __ U.S. __, 121 S. Ct. 565 (2000)), and an amicus in another (*In re Herbold*, No. 00-1137 (3d Cir. May 31, 2000) (same)). Owens-Illinois continues to be vitally interested in the conduct of MDL 875 proceedings, where it remains a defendant in many cases.

the Third Circuit committed any other legal error — its decision was discretionary, and the requested writ of mandamus is an extraordinary one — much less a profound error meriting review.

The Petitioners suggest that the Third Circuit treated their claims too harshly when it applied long-settled mandamus standards to deny their petition. Pet. at 3. They contend that the statutory provision concerning review of Panel decisions must provide more searching review than that already "available at common law" by extraordinary writ: "Congress's specific instruction that the Panel be reviewed through mandamus would be superfluous unless the intention was to relax the standards applicable to this statutory mandamus remedy." *Id.*

The Petitioners' assertion has no merit. First, it is just not true that statutory review of the Panel's decisions must be more generous than common law mandamus. The Panel is a creature of statute and Congress has specifically circumscribed review of the Panel's decisions. For example, a decision of the Panel *not* to transfer an action cannot be reviewed. Period. *See* 28 U.S.C. § 1407(e) ("There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."). *See also In re the Custody of Testa*, 1993 WL 88302 (D.C. Cir.) (denying a petition for writ of mandamus because the "statute establishing procedures for the Judicial Panel on Multidistrict Litigation precludes review of 'an order of the panel denying a motion to transfer for consolidated or coordinated proceedings'"), *quoting* Section 1407(e), *cert. denied*, 508 U.S. 954 (1993).

Congress could have provided that Panel decisions subject to review should be treated as final judgments for purposes of 28 U.S.C. § 1291, but it did not. Instead, Congress provided for review only by extraordinary writ. *See, e.g., Patenaude*, 210 F.3d at 140.

Second, the Petitioners' statutory versus common law mandamus argument was never raised by any party below, with good reason. In seeking the writ, the Mandamus Petitioners invoked the traditional test, which requires that petitioners have no other adequate means of relief available and that their right to relief is clear and indisputable. *See* Petition for Writ of Mandamus at 3 ("The two prerequisites for the issuance of a writ of mandamus are that the petitioners have no other adequate means to obtain the relief sought and that they have shown that their right to the writ is clear and indisputable."), *quoting Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994), *quoting Kerr v. United States District Court*, 426 U.S. 394 (1976). The Petitioners' claim (to the extent the Petitioners have standing at all) must rise or fall with the arguments raised by the Mandamus Petitioners. The Mandamus Petitioners invoked the correct standard and lost below. The Petitioners cannot seek to change the applicable standard for the first time in this Court, particularly not as a basis for seeking review.

Nor is the issue on which the Petitioners have sought review particularly important. The substantive issue is a straightforward question of statutory interpretation: Does Section 1407(a) permit the Panel to sever punitive damages claims? As discussed in Section II.C below, the challenged interpretation of Section 1407(a) — an interpretation on which the district court, the Panel, and the

Third Circuit unanimously agreed — is plainly correct on the merits. Apart from the correctness of that interpretation, however, the issue does not merit review. The Petitioners have not cited a single case with which the Third Circuit's decision purportedly conflicts. Indeed, they have not cited a single case interpreting the proviso in Section 1407(a). If, as it appears, the issue whether the proviso permits the severance of punitive damages claims is one of first impression, then it is particularly unsuitable for certiorari review.

B. The Transferee Court's Treatment of Punitive Damages Claims Is Legitimate and Appropriate.

The Third Circuit held that "[a]n even more compelling reason to adopt the Panel's interpretation [of Section 1407(a)] is the public policy underlying the practice of severing punitive damages claims." App. 5. Characterizing the practice of severing punitive damages as "enlightened," the court noted that "[t]he resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating." *Id.* at 6.

In seeking review, the Petitioners challenge both the validity and the legitimacy of the Third Circuit's conclusion. They assert that MDL 875 has failed to provide relief to asbestos plaintiffs, preventing "the vast majority of those cases from reaching trial, even when discovery has been completed and settlement efforts have been exhausted." Pet. 2. They challenge the Third Circuit's and the Panel's endorsement of Judge Weiner's practice of seeking to preserve the assets of asbestos defendants. *Id.* These claims are untrue and, in any case, provide no basis for granting review.

1. Punitive Damage Claims Are Routinely Resolved With the Rest of the Claim.

The successive mandamus petitions challenging the MDL 875 remand practice have suggested that huge numbers of punitive damage claims, severed from the remainder of cases in MDL 875, remain in limbo, incapable of being addressed within the multidistrict proceedings and unable to escape. Not true. As the Third Circuit has noted (*Patenaude*, 210 F.3d at 140), by January 1999 nearly 60,000 cases had been resolved and dismissed *in their entirety* (punitive damage claims and all) within MDL 875, under Judge Weiner's aegis, with cases recently being resolved at a rate of approximately 10,000 per year. In addition, thousands more had been resolved in their entirety, though not yet dismissed because of paperwork lags. *Id.* at 139-40; *In re Asbestos Prods. Liability Litigation (No. VI)*, 1996 WL 539589, at *1 & n.3 (E.D. Pa. Sept. 16, 1996). Still more of these multi-defendant cases had been resolved in their entirety as to many defendants, with "only one or two actual claims remaining." *Id.* Since these resolutions include both compensatory and punitive claims, many thousands of punitive claims have been resolved.

The punitive claims at issue here are only a small fraction of those asserted at the outset. Judge Weiner has noted that he uses all his creative power to promote settlement before considering remand, and "as a practical matter, these actions are seldom returned [to the transferor courts] until [only] one or two defendants remains, and then, they routinely settle in total without trial." *Id.* at *1 n.2. The Third Circuit has approved Judge Weiner's MDL 875 management strategy to "resist . . . remand" until "avenues of settlement were exhausted." *Patenaude*, 210 F.3d at 140.

In each of the remanded cases, the bulk of the multiple defendants have already resolved the claims in their entirety — punitive claims and all. Only the punitive claims against those few defendants remaining experience the severance challenged here — and even then the parties remain free to, and according to Judge Weiner "routinely" do, settle all of their claims. The asserted 'problem' of severed punitive claims is therefore illusory.

2. The Remaining Punitive Claims Are Subject to Legitimate Pretrial Coordinated Proceedings.

Contrary to the suggestions of those who have challenged the MDL 875 remand practices, Judge Weiner may and does conduct legitimate coordinated pretrial proceedings concerning those punitive claims remaining in MDL 875. First, the transferee court may retain the punitive claims now and remand them later, for sequencing of claims is itself at the heart of pretrial coordination. Second, the retained punitive claims may be settled, for settlement is a legitimate pretrial proceeding. Finally, the transferee court may resolve the claims on their merits, for dispositions on motion are also legitimate pretrial proceedings.

a. Deferral of Punitive Claims.

The Third Circuit has recognized that legitimate multidistrict pretrial proceedings include coordination of single claims with the larger litigation as a whole. *Patenaude*, 210 F.2d at 142-45. One of the biggest challenges of coordination in the asbestos litigation has been to ensure the availability of funds to pay those who are truly sick or injured, in an arena where large numbers of claims continue to be

asserted, the defendants' resources are finite, and a large number of defendants have become bankrupt. This challenge of coordination was recognized by the Panel at the creation of MDL 875 (*In re Asbestos Prods. Liability Litigation (No. VI)*, 771 F. Supp. 415, 418-22 (J.P.M.L. 1991)), by Judge Weiner (e.g., *In re Asbestos Prods. Liability Litigation (No. VI)*, 1996 WL 539589, at *1), and by the Third Circuit (*Patenaude*, 210 F.3d at 139-40, 142-45).

Sequencing of claims for resolution is a proper part of pretrial multidistrict litigation. *See, e.g.*, Hearings Before a Subcommittee of the United States Senate Judiciary Committee on S. 3815, 89th Cong. 2d Sess. (Oct. 20-21, 1966) ("Senate Hearings") at 9 (test. of Dean Phil C. Neal re experience underlying enactment of 28 U.S.C. § 1407; emphasizing sequencing as a key part of coordinated pretrial proceedings). This is true even when the claims to be sequenced are of parallel urgency. It is especially so when the competing claims are *not* of equal urgency — when, as here, claims for core compensatory damages compete with demands for windfall punitive awards to which no plaintiff may claim a "right,"[5] whose payment today may imperil the ability of another plaintiff to recover compensatory damages tomorrow. This peril is very real given the numbers of claimants and the growing bankruptcies of defendants.

In these circumstances, the deferral of punitive damages claims, sequencing them after the more urgent compensatory damages claims, is perfectly proper "coordination" of the litigation under 28 U.S.C. § 1407.

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5. As the Third Circuit noted, App. 6, punitive damages are a "windfall," to which no plaintiff may claim a right. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (punitive damages are a "windfall to a fully compensated plaintiff").

b. Settlement of Punitive Claims.

In fact, handling of the severed punitive claims is not limited to deferral for later remand. Judge Weiner may continue to encourage settlement of these claims.[6] Fostering settlement is, as the Third Circuit has held, both "coordinated" and "pretrial" activity, and therefore proper for MDL proceedings. *Patenaude*, 210 F.3d at 142-45. *See also* Senate Hearings at 11-12 (test. of Dean Neal).

c. Resolution of Punitive Claims.

Settlement is not the only means by which Judge Weiner could reach pretrial resolution of the punitive claims. Pretrial MDL proceedings may also include resolution by summary judgment. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 n.6 (1998) (decision on the merits is "perfectly proper as a pretrial order"); *Humphreys v. Tann*, 487 F.2d 666, 667-68 (6th Cir. 1973) ("pretrial proceedings" included all pretrial matters, such as motions for summary judgment); C. Wright & A. Miller, 15 Federal Practice & Procedure § 3866, at 606 n.1, 609-10 & n.10 (2d ed. 1986 & Supp. 2000) (same).

It is within Judge Weiner's power, as an MDL transferee judge, to reach and resolve the merits of the punitive damages claims. For example, under federal law there is a due process

6. Such settlements may be on a broad scale, even if a class action device is unavailable. For example, even though *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), held that parties to asbestos litigation could not settle future asbestos-related claims on a global basis through a class action, the defendants and plaintiff class attorneys in the *Amchem* case also successfully negotiated the settlement of all their current, existing cases, without the use of any class action.

limit on punitive damages. *B.M.W. of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996).[7] Judge Weiner may confront the issue whether the due process limit has been reached — particularly when some defendants have already paid substantial compensatory or punitive awards and have long since ceased any asbestos-related business, making any deterrence rationale for further punitive awards moot.[8]

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7. It is well established that repetitive punitive damages awards raise serious constitutional concerns. *See Dunn v. HOVIC*, 1 F.3d 1371, 1385-91 (3d Cir.) (en banc) (recognizing that repetitive awards of punitive damages could, on an appropriate evidentiary record, be shown to violate due process), *cert. denied*, 510 U.S. 1031 (1993); *In re Northern Dist. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir. 1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990). In the absence of procedural safeguards, repetitive punitive damages cumulatively exceed the amount reasonably required to achieve the societal goals of deterrence and retribution, and unfairly subject defendants to multiple punishment for lawsuits arising from the same course of conduct.

8. Owens-Illinois, for example, commercially manufactured only a single asbestos-containing product, for ten years ending in April 1958. It nevertheless has been named hundreds of thousands of times in asbestos-related litigation, and has paid extraordinary amounts to resolve the compensatory damages claims in those cases. Punitive damages are unnecessary to deter it from conduct that, even if blameworthy at the time, ended more than forty years ago.

Retention within MDL 875 of punitive claims therefore may reflect not only a prudent priority on the resolution of compensatory claims, but also a necessary element of Judge Weiner's constitutional obligation to preserve the defendants' due process rights.[9]

C. Section 1407(a) Permits the Severance of Punitive Damages Claims.

Shorn of its rhetoric, the Petition seeks review on the ground that the Third Circuit erred in holding that Section 1407(a) permits the severance of punitive damages claims. There is no basis for contending that either the Third Circuit's or the Panel's interpretation of Section 1407 was wildly wrong so as to call for the exercise of this Court's supervisory power. At best, the Petitioners contend that the statute is ambiguous and that they have the better argument. That is not enough.

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9. Indeed, under *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), any further awards of punitive damages in the asbestos litigation may violate due process unless and until a rational system for reviewing awards of all punitive damages is set in place. While upholding the award in the *Haslip* case itself, this Court expressly rejected the notion that the imposition of punitive damages "is never unconstitutional" and expressed its concern about punitive damages that "run wild." *Id.* at 18. In order to ensure against punitive damages greater than necessary to accomplish the societal goals of deterrence and retribution, *Haslip* required the establishment of a system ensuring "rational decisionmaking" and "meaningful individualized assessment of appropriate deterrence and retribution." *Id.* at 20. No procedure, process or system has been established to ensure that remand would not result in the award of punitive damages as retribution for conduct already punished by other juries. By contrast, exclusion of punitive claims from remand orders is consistent with the constitutional obligation to avert the imposition of repetitive, overlapping and excessive punitive damages awards.

The Petitioners cannot claim that they are being deprived of an opportunity to seek redress for personal injuries, for the Panel has remanded the Mandamus Petitioners' compensatory damage claims for trial. The Petitioners cannot dispute that they seek, in the words of the Third Circuit, "exemplary punitive damage windfalls." App. 6.

On the merits, the Petitioners' construction of Section 1407(a) is untenable. According to the Petitioners, "claim" in Section 1407(a) should be read as synonymous with a stand-alone "cause of action" and a request for punitive damages should be interpreted merely as an "issue" as that term is used in Rule 42(b). Two reviewing courts thoroughly considered and rejected this argument below.

Before issuing its decision, the Panel heard argument on the Mandamus Petitioners' motion to remand their punitive claims. *See* Mandamus Pet. Ex. M, 11/19/99 transcript of hearing before the Judicial Panel on Multidistrict Litigation. As one Panel member noted at the hearing: "I am like Justice Stewart. I think I know what it is when I see it. It [punitive damages] looks like a claim to me." *Id.* at 19.

And despite the Petitioners' claim that the Third Circuit treated the Mandamus Petitioners harshly by affording scant review, that court ordered full briefing on the merits and issued a published opinion in which the court considered and rejected the claims. In particular, the Third Circuit noted that "[a]s a term of art and in common parlance, the meaning of 'claim' is not so circumscribed" as the Petitioners read it. App. 4. The court noted that "a cause of action based upon negligence is frequently described as including 'claims' for property damage, lost wages, medical bills, and pain and

suffering." *Id.* The court considered the statute's language and its legislative history, but could find nothing that would support the "crabbed reading" of "claim" the Mandamus Petitioners proposed. *Id.* Instead, the legislative history demonstrated that "Congress intended transferee courts to have broad pretrial authority." *Id.* (internal citations and quotation omitted). "In our view, the Panel's expansive interpretation of 'claim' is the more reasonable one and that which we endorse." *Id.*

The Panel and the Third Circuit did not adopt a wildly wrong interpretation of Section 1407(a). It would make no sense for this Court to grant review merely to endorse that interpretation, particularly when, as here, no other court has issued a conflicting opinion and there are serious issues whether any party before the Court is entitled to relief on the Petition.

CONCLUSION

For the foregoing reasons, Owens-Illinois, Inc. respectfully requests that the Petition for a Writ of Certiorari be dismissed or, in the alternative, denied.

Respectfully submitted,

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Dated: May 3, 2001